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Supreme Court, U.S.
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No. 88-1933

IN THE

Supreme Court of the United States

October Term, 1988

JAMES CONSTANT,

Petitioner,

vs.

ADVANCED MICRO-DEVICES, INC., ANALOG DEVICES, INC., AT & T, FLOATING POINT SYSTEMS, INC., FUJITSU, LTD., FUJITSU MICROELECTRONICS, INC., NEC ELECTRONICS, INC. and TEXAS INSTRUMENTS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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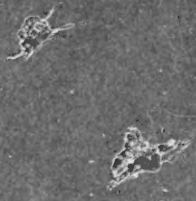

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner, by filing an amended complaint, waived any right he had to challenge the District Court's dismissal without prejudice of his original complaint?

2. Whether the District Court abused its discretion in ordering petitioner to replead his original complaint with greater specificity, when the complaint was vague and ambiguous and respondents could not adequately frame a response, petitioner was proceeding *pro se*, and petitioner had a history of abusive litigation practices?

3. Whether petitioner was entitled to voluntarily dismiss parties who had answered his original complaint, moved for summary judgment, or had otherwise been involved in protracted litigation with petitioner?

4. Whether the District Court abused its discretion in dismissing petitioner's amended complaint with prejudice under Fed. R. Civ. P. 41(b), for petitioner's willful and continued refusal to comply with an order of the court?

5. Whether the District Court's dismissal of petitioner's patent infringement action against private party defendants was a taking of property without just compensation, in violation of the Fifth Amendment?

6. Whether the District Court's dismissal of petitioner's action pursuant to Fed. R. Civ. P. 41(b), after a full hearing, for willful refusal to comply with a court order, violated petitioner's due process rights?

7. Whether the District Court and Court of Appeals violated petitioner's due process and equal protection rights by ordering petitioner to pay costs and attorneys' fees pursuant to Fed. R. Civ. P. 11 and Fed. R. App. P. 38, after petitioner brought a frivolous request for default judgment against one defendant in the District Court, and brought an unfounded and vexatious appeal of the District Court's dismissal of all defendants in the Appellate Court?

8. Whether the issues presented are appropriate for review on writ of certiorari, when they are not novel, important questions, and address only frivolous claims?

RULE 28.1 STATEMENT

Eastern Telephone and Telegraph is a non-wholly owned subsidiary of respondent AT&T. There are no other non-wholly owned subsidiaries, parent companies, or affiliates of the respondents that need to be listed pursuant to Supreme Court Rule 28.1.

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James Constant v. Advanced Micro-Devices, Inc., et al.

No. 88-1414

James Constant v. Advanced Micro-Devices, Inc., et al.

No. 88-1196

James Constant v. Robert Hillman

No. 88-1198

James Constant v. Marcian Hoff, et al.

No. 88-1197

James Constant v. Hitachi America, Ltd., et al.

No. 88-1195

James Constant v. Stephen Wilson; Robert Hillman

Supreme Court of the United States:

No. 88-308

James Constant v. Advanced Micro-Devices, Inc., et al.

No. 88-1356

James Constant v. Advanced Micro-Devices, et al.

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ADVANCED MICRO-DEVICES, INC., ANALOG DEVICES, INC., AT & T, FLOATING POINT SYSTEMS, INC., FUJITSU, LTD., FUJITSU MICROELECTRONICS, INC., NEC ELECTRONICS, INC. and TEXAS INSTRUMENTS, INC.,

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit from which petitioner seeks certiorari is not reported. A copy of that Opinion is attached to Petitioner's Petition for Writ of Certiorari at Appendix A-2 (hereinafter "Pet. App.").

JURISDICTION

The principal judgment of the Court of Appeals was entered on April 11, 1989. (Pet. App. at A-2). A petition for rehearing was denied on May 3, 1989. (Pet. App. at A-7). The judgment of the Court of Appeals for costs and attorneys' fees on appeal was entered on May 11, 1989. (Pet. App. A-10). The petition for writ of certiorari was filed on May 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

This lawsuit commenced on February 16, 1988, when Petitioner James Constant filed a Complaint for Patent Infringement in the Central District of California against Advanced Micro-Devices, Inc. ("AMD"); Analog Devices, Inc. ("Analog Devices"); AT&T; Floating Point Systems, Inc. ("FPS"); Fujitsu Microelectronics, Inc. ("FMI"); Fujitsu Limited ("FJ"); NEC Electronics, Inc. ("NEC"); and Texas Instruments, Inc. ("TI").[1] Petitioner's Complaint generally alleged that respondents had made, used, and sold devices which infringed his United States Patent No. 4,006,351 ('351 Patent), although the Complaint was extraordinarily vague and confusing.

All respondents timely filed either an answer, motion to dismiss, or motion for a more definite statement in response to the Complaint. Petitioner filed diverse motions for summary judgment, judgment on the pleadings, sanctions or to strike against respondents.

On June 13, 1988, Judge Wilson held a hearing on motions by both sides. After oral argument, Judge Wilson denied all petitioner's motions. He granted AMD's motion to dismiss for improper venue. Finally, Judge Wilson granted FMI's motion to dismiss the Complaint, but gave petitioner a chance to replead.

In his June 17, 1988 order, Judge Wilson stated:

> "First, Plaintiff must specifically identify each of the Defendants' allegedly infringing products. Second, Plaintiff must identify the particular elements of his patent which are infringed, as well as how those elements are infringed by each allegedly infringing product. Third, Plaintiff should

[1] The defendants in the District Court action are collectively referred to herein as respondents.

be particularly mindful about limiting his allegations of infringement to elements within the scope of his patent." (Pet. App. at B-3).

Petitioner filed an amended complaint on June 30, 1988. TI filed an answer and counterclaim. However, because the amended complaint did not comply with the repleading order, FMI moved to dismiss it. All of the respondents, including TI, joined in this motion.

Petitioner thereafter filed a motion for entry of default judgment against all defendants except TI and FJ, claiming the motion to dismiss was not an answer. Although TI had answered the amended complaint, Constant subsequently requested that default also be entered against TI. On August 29, 1988, Judge Wilson denied petitioner's default requests, granted FMI's motion to dismiss petitioner's amended complaint without prejudice, and afforded petitioner one more opportunity to file a complaint in compliance with the repleading order.

Additionally, Judge Wilson sanctioned petitioner for his unfounded attempt to take TI's default.

However, petitioner refused to comply with Judge Wilson's repleading order. Instead, on September 16, 1988, petitioner filed a document entitled "Plaintiff's Response to Court's Order to Replead Amended Complaint" wherein he asserted that he considered the District Court's repleading order erroneous and in excess of the court's authority, and that he would not replead. (Pet. App. at B-4 to B-5). On September 22, 1988, petitioner filed a Notice of Dismissal without prejudice as to all defendants except TI and FJ, and this dismissal was entered by the District Court.

On October 3, 1988, Judge Wilson dismissed petitioner's amended complaint with prejudice as to TI and FJ, on the grounds that petitioner had failed to comply with the June 17, 1988 repleading order and had unequivocally stated to the court that he would *not* follow the court's order. On October 24, 1988, pursuant to respondents' motions, Judge Wilson vacated petitioner's voluntary dismissal of certain respondents entered September 22, 1988, and dismissed the amended complaint with prejudice as to all respondents. The order dismissing the amended complaint with prejudice was entered October 31, 1988. (Pet. App. at B-2). The order granting Texas Instruments' motion for sanctions was entered February 9, 1989. (Pet. App. at B-21).

Petitioner appealed these and other District Court orders to the United States Court of Appeals for the Federal Circuit, which affirmed the District Court in all respects. (Pet. App. at A-2). The Federal Circuit held, *inter alia*, that the District Court was wholly within its discretion in dismissing petitioner's complaint with prejudice because of his refusal to obey the District Court's repleading order. (Pet. App. at A-5). Concluding that petitioner's appeal was "completely unfounded and vexatious," the Federal Circuit imposed sanctions against petitioner and ordered him to pay respondents the attorney's fees and costs incurred on appeal.

Constant then filed this petition for writ of certiorari.

SUMMARY OF ARGUMENT

Petitioner has not presented this Court with any issues that would merit review. Petitioner's grievances are all a direct result of his own actions and willful refusal to obey the District Court's second repleading order. Petitioner, by filing an amended complaint, waived any right to object to the dismissal of his original complaint and to the first repleading order. Petitioner's request for default against an answering defendant was frivolous, and the District Court properly imposed sanctions. Furthermore, petitioner's notice of voluntary dismissal was improper and untimely, hence, the District Court did not err in vacating it. Finally, the District Court was completely justified, as the Federal Circuit concluded, in dismissing petitioner's amended complaint with prejudice due to petitioner's outright refusal to obey the court's repleading order. Petitioner's appeal from the District Court's well-founded dismissal was frivolous, and sanctions were properly imposed by the Federal Circuit.

This Court should not reward petitioner's blatant disrespect for the judicial system by granting review.

ARGUMENT

I. Petitioner Waived Any Right to Object to the Order Dismissing His Original Complaint and Ordering Him to Replead.

Petitioner urges this Court to review the District Court's order dismissing his original complaint without prejudice and ordering him to replead. Petitioner's objections to this order were waived, however, when he filed his amended complaint.

The law is well established in the Ninth Circuit and others that by filing an amended complaint, a plaintiff waives any error in the original repleading order. *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Moreover, a party who amends his pleading waives any right to object to a trial court's repleading order which was based on grounds of indefiniteness, incompleteness, insufficiency or other technical defects in the original complaint. *Sacramento Coca-Cola Bottling Co. v. Local 150 Chauffeurs*, 440 F.2d 1096, 1098 (9th Cir. 1971), *cert. denied*, 404 U.S. 826 (1971). Accordingly, petitioner waived any right he may have had to contend that his original complaint was proper and should not have been dismissed, or that the court erred in issuing a specific repleading order. The Federal Circuit need not have even considered the merits of the District Court's June 17, 1988 order dismissing petitioner's complaint and ordering repleading, and its ruling affirming the District Court's decision was correct on this ground alone.

II. The District Court Did Not Abuse Its Discretion in Dismissing Petitioner's Complaint Without Prejudice and Ordering Him to Replead With Greater Specificity.

Petitioner contends that because his complaint was drafted in accordance with Form 16 of the Appendix of Forms of the Federal Rules of Civil Procedure, it was a proper pleading and was sufficient to withstand a motion to dismiss. Petitioner's contention is completely irrelevant, however, since the District Court did not dismiss Petitioner's complaint for failure to state a claim. (Pet. App. at B-3).

The District Court stated, in its October 31, 1988 Order Dismissing Amended Complaint With Prejudice, that although petitioner's original complaint was "barely sufficient" under the liberal pleading requirements in Federal Court (Pet. App. at B-2), the respondents would not be in a position to properly respond to the allegations until the complaint was more detailed. The District Court also found that any discovery would be completely disorganized if the complaint remained in its current indefinite form. (Pet. App. at B-7). The District Court was entitled to so rule:

> It has long been settled that while the forms contained in the Appendix of Forms attached to the Federal Rules of Civil Procedure "are intended to indicate the simplicity and brevity of statement which the rules contemplate," FRCP 84, *compliance with the forms will not* prevent a dismissal for failure to plead *specific facts. Washburn v. Moorman Mfg. Co.*, 25 F. Supp. 546 (S.D. Cal. 1938). (Pet. App. at B-8). (Emphasis added.)

The authority of the court to order repleading is also supplemented by the court's broad inherent power to regulate litigation before it. *See, e.g., Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 951 (9th Cir. 1976).

The District Court was further justified in ordering petitioner to replead given the totality of the circumstances before the Court. Petitioner was a *pro se* plaintiff with a long history of filing meritless claims and taking frivolous positions, of which the District Court was well aware. *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1572 (Fed. Cir. 1988). In this case, shortly after filing the complaint, petitioner filed a host of frivolous motions against respondents, for summary judgment, judgment on the pleadings, sanctions and to strike, all of which were properly denied by the District Court. (Pet. App. at A-4). It was therefore well within the discretion of the District Court to require petitioner to follow procedures beyond the bare bones forms approved by the Federal Rules of Civil Procedure. *Miller v. Los Angeles County Bd. of Educ.*, 799 F.2d 486, 488 (9th Cir. 1986).

Given petitioner's prior litigation tactics and *pro se* status, the District Court appropriately exercised its inherent authority to control the litigation before it by dismissing the original complaint for vagueness and ordering petitioner to replead. The Federal Circuit properly concluded that petitioner's contentions on appeal were "totally unfounded," (Pet. App. at A-3), and "totally fail to manifest even an *appearance* of an abuse of discretion by the District Court." *Id.*

III. Since Respondents Had Either Answered Petitioner's Complaint, Moved to Dismiss, or Otherwise Participated in Protracted Litigation, Petitioner Could Not Voluntarily Dismiss Them From the Action.

Petitioner argues that his notice of voluntary dismissal divested the District Court of its jurisdiction over all respondents except FJ and TI, who were not included in the voluntary dismissal. Petitioner erroneously concludes

that after he filed the notice, the District Court was without jurisdiction to enforce its interlocutory orders or to dismiss the amended complaint with prejudice as to *all* respondents. However, petitioner ignores the fact that the District Court vacated his notice of dismissal because the notice was improper and untimely, and therefore ineffective to divest the district court of its jurisdiction over the litigation.

A. The District Court Had Jurisdiction To Determine If Petitioner's Notice Of Voluntary Dismissal Was Proper.

A District Court retains jurisdiction to determine if a plaintiff's notice of voluntary dismissal is filed in compliance with Fed. R. Civ. P. 41. Where a plaintiff's notice of voluntary dismissal is untimely, the notice of dismissal is a nullity. *Tele-Views News Co. v. S.R.B. TV Publishing Co.*, 28 F.R.D. 303, 308 (E.D. Pa. 1961) (on motion for reargument). If the court determines that a notice of voluntary dismissal was improperly filed, and is therefore a nullity, it is entirely appropriate for the court to vacate the voluntary dismissal. *Armstrong v. Frostie Company*, 453 F.2d 914, 916 (4th Cir. 1971).

For the reasons discussed below, Judge Wilson properly determined that petitioner's notice of dismissal was improper and untimely, and therefore a nullity. It was thus within the court's discretion to vacate the notice of dismissal and enter an order dismissing the case with prejudice against *all* respondents.

B. Petitioner's Notice of Dismissal was Improper and Untimely.

The District Court was within its discretion in vacating petitioner's notice of dismissal and dismissing the action with prejudice as to Analog, NEC and AT&T, since they each filed answers to petitioner's original

complaint before petitioner attempted to voluntarily dismiss them. *Armstrong v. Frostie Co.*, 453 F.2d 914, 916 (4th Cir. 1971); *Tedeschi v. Smith, Barney, Harris, Upham & Co.*, 95 F.R.D. 182, 183 (S.D.N.Y. 1982).

Furthermore, the District Court properly vacated the notice of dismissal as to FPS, since FPS had requested summary judgment in its memorandum opposing petitioner's motion for summary judgment. An informal request for summary judgment is the equivalent of a formal motion for summary judgment, *Bulchis v. City of Edwards*, 671 F. Supp. 1270, 1271 (W.D. Wash. 1987), and can terminate petitioner's right to unilaterally dismiss. *See Sheldon v. Amperex Elec. Corp.*, 449 F.2d 146, 147 (2d Cir. 1971) (a motion for summary judgment, *or the equivalent*, can terminate a unilateral right to dismiss).

Entering a dismissal with prejudice as to FMI was also appropriate under the equitable exception to Fed. R. Civ. P. 41(a)(1) set forth in *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105, 108 (2d Cir. 1953), *cert. denied*, 345 U.S. 964 (1953) and acknowledged in *Hamilton v. Shearson-Lehman American Express, Inc.*, 813 F.2d 1532, 1534 (9th Cir. 1987). As the District Court correctly recognized, at the time of petitioner's notice of dismissal, the "litigation [had] clearly proceeded well beyond an 'advanced' stage such that it would be contrary to the purposes of Rule 41(a)(1) to allow plaintiff to voluntarily dismiss [FMI] without prejudice." (Pet. App. at B-19).

After pointing out the number of motions filed by petitioner, and the considerable burden petitioner had placed on FMI (and the other defendants), the District Court concluded: "If ever there was a case which called for an application of the *Harvey* exception, this is it."

(Pet. App. at B-19). The District Court was well within its discretion in so deciding, and the Federal Circuit properly affirmed the District Court's decision to vacate the voluntary dismissal and enter an order dismissing the amended complaint with prejudice as to all respondents. (Pet. App. at A-5 to A-6).

IV. The Federal Circuit Correctly Found That the District Court Did Not Abuse Its Discretion in Dismissing Petitioner's Complaint With Prejudice.

A. The Standard of Review.

"The decision to dismiss for failure to comply with an order [of the court] is within the discretion of the trial judge." *Fendler v. Westgate California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975). Absent any abuse of discretion on the part of the district court in dismissing a complaint for disobedience of a court order, the reviewing court should affirm the district court's decision. *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 699 F.2d 484, 485 (1983), *cert. denied*, 465 U.S. 1080 (1984).

B. The District Court Had Ample Authority to Dismiss This Action With Prejudice for Petitioner's Willful Refusal to Obey an Order of the Court.

If a plaintiff disobeys an order of the court, the court is authorized under Fed. R. Civ. P. 41(b) to enter an involuntary dismissal. *Wood*, 699 F.2d at 485. The court may dismiss plaintiff's action under Rule 41(b) on its own motion. *Burgs v. Sissel*, 745 F.2d 526, 528 (8th Cir. 1984). As the Ninth Circuit has recognized, district courts have an inherent authority to dismiss an action in order to protect the integrity of the court's orders and to ensure the orderly administration of justice. *Fendler*, 527

F.2d at 1170. Dismissal is appropriate when a plaintiff is ordered to file an amended complaint setting out the facts on which he relies, and he fails to do so. *Finley v. Rittenhouse*, 416 F.2d 1186, 1187 (9th Cir. 1969).

The District Court was within its discretion in dismissing Petitioner's amended complaint with prejudice as a result of Petitioner's willful refusal to comply with the court's repleading order. Fed. R. Civ. P. 41(b). *Schmidt v. Herrman*, 614 F.2d 1221, 1224 (9th Cir. 1980). Petitioner admits that it would have been a simple matter to comply. (Pet. at 9). There is no question of inadvertence or misunderstanding. In petitioner's unauthorized "Response to Court's Order to Replead Amended Complaint", he boldly asserts his intention to defy the court's repleading order. (Pet. App. at B-4 to B-5). The court was amply justified in dismissing the amended complaint with prejudice.

Given petitioner's complete lack of respect for the court and its orders, the Federal Circuit was more than justified in affirming the District Court's dismissal with prejudice. (Pet. App. at A-6). Not only did the Federal Circuit find that the District Court acted well within its discretion in all respects, (Pet. App. at A-6), it found that petitioner's appeal from the District Court's decision was "completely unfounded and vexatious . . ." and ordered petitioner to pay costs and attorney's fees to respondents. (Pet. App. at A-6).

V. The District Court's Involuntary Dismissal of Petitioner's Complaint Did Not Amount to a Taking of Property in Violation of the Fifth Amendment.

Petitioner contends that the District Court's involuntary dismissal of his patent infringement action against private party defendants constitutes a taking of

property without just compensation in violation of the Fifth Amendment. He erroneously reasons that this dismissal with prejudice has diminished the value of his patent, since it operates as an adjudication on the merits, and he can no longer "exploit his invention." (Pet. Brief at 21). Petitioner's contention has no merit.

A. Petitioner Has Failed to Preserve the "Taking" Issue.

Petitioner failed to raise his "taking of property" argument before the Federal Circuit. The Supreme Court has stated that it "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258 (1987). Although the Court has discretion to decide an issue despite petitioner's failure to preserve it, no appropriate equitable considerations exist in this case. *See, e.g., Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (considering an issue not raised at trial when petitioner argued issue on appeal and respondent failed to object until oral argument in Supreme Court).

B. Petitioner's "Taking" Claim Lacks Merit.

Apart from the above procedural defect, petitioner's "taking" argument wholly lacks merit, representing nothing more than petitioner's confusing his patent infringement claim against private respondents with his objections to the District Court's involuntary dismissal of his case under Fed. R. Civ. P. 41(b). An order of dismissal of a patent infringement complaint by a court of competent jurisdiction is *not* an unconstitutional taking of property. Otherwise, every time a plaintiff lost a patent infringement case, it would be followed by a claim of unconstitutional taking.

The only context in which the government could be held liable for an unconstitutional taking is if the government is accused of patent infringement. "The theory for recovery against the government for patent infringement is not analogous to that in litigation between private parties. When the government has infringed, it is deemed to have 'taken' the patent license under an eminent domain theory." *Leesona Corp. v. United States*, 599 F.2d 958, 964 (Ct. Cl.), *cert. denied*, 444 U.S. 991 (1979).

Thus, at the most basic level, petitioner must allege governmental infringement in order for his "taking" claim to lie against a court of the United States. *Crozier v. Fried Krupp Aktiengesellschaft*, 224 U.S. 290, 304 (1912); *Leesona Corp.*, 599 F.2d at 965. Petitioner has not alleged any such governmental action. Petitioner's claimed "taking" is the District Court's use of Fed. R. Civ. P. 41(b), the purpose of which is to sanction plaintiffs who violate court orders by dismissing their actions. Petitioner's "taking" argument is clearly out of context, and meritless.

VI. Dismissal Pursuant to Rule 41(b) Did Not Violate Petitioner's Due Process Rights.

Petitioner erroneously asserts that the District Court and the Federal Circuit violated his due process rights by dismissing his action without allowing him a hearing on the merits of his infringement claim. As previously stated, the court acted pursuant to Fed. R. Civ. P. 41(b), which permits involuntary dismissal for failure to comply with a court order. The Federal Rules of Civil Procedure are an Act of Congress, and are presumptively constitutional. *Schweiker v. McClure*, 452 U.S. 1301, 1303 (1981); *Marshall v. Barlow's, Inc.*, 429 U.S. 1347,

1348 (1977). "Absent compelling equities on the other side," which are not present here, petitioner's due process claim fails. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1352 (1977). Moreover, petitioner was afforded numerous hearings before the District Court on the issue of dismissal of his complaint.

The Federal Circuit recently addressed this point in a different action by the same petitioner against the same defendants as in this case. In *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir.), *cert. denied*, 109 S. Ct. 228 (1988), and the Federal Circuit stated, "It is unambiguously clear that federal judicial proceedings, with their extensive notice, opportunity to be heard, and procedural protections, satisfy the constitutional requirement of procedural due process required for the invalidation of a patent." *Id.* at 1565. *Accord, 3 Penny Theater Corp. v. Plitt Theatres, Inc.*, 812 F.2d 337 (7th Cir. 1987) (calling dismissal with prejudice a harsh sanction but a necessary tool).

As set forth above, the District Court did not abuse its discretion in applying Rule 41(b) in this case. The court found petitioner's complaint so vague and ambiguous that respondents could not formulate an answer and discovery would be completely disorganized. Thus, the District Court ordered petitioner to replead and delineated exactly how petitioner should change the complaint. When petitioner's next complaint did not conform with the order, the District Court gave him another opportunity to comply. However, petitioner expressly refused to comply. Petitioner was given ample opportunity to be heard. The District Court was justified in dismissing the action with prejudice under these circumstances, as the Federal Circuit held.

VII. The District and Appellate Courts Did Not Violate Petitioner's Due Process and Equal Protection Rights By Imposing Sanctions.

Petitioner claims that the District Court and Federal Circuit violated his due process and equal protection rights by requiring him to pay costs and attorneys' fees. Sanctions have been upheld in cases with similar facts, as set forth below.

A. The District Court Did Not Abuse Its Discretion in Sanctioning Petitioner.

Petitioner contends that the District Court should not have ordered him to pay $1,500 in sanctions to defendant Texas Instruments. The court ordered this sanction for petitioner's "frivolous conduct in requesting the entry of default against TI after TI had already answered the amended complaint." (Petitioner, App. B-21). Such conduct warrants sanctions under Fed. R. Civ. P. 11.

Under Rule 11, the pivotal inquiry is whether a reasonable attorney would have signed the request for default, believing it is "well grounded in fact and is warranted by existing law or a good faith argument . . . ." Fed. R. Civ. P. 11. *See generally, Zaldivar v. Los Angeles,* 780 F.2d 823 (9th Cir. 1986). Filing a request for default *after* an answer has been filed is so contrary to the fundamental principles of procedure that no reasonable attorney would have signed petitioner's request for default. *See* Fed. R. Civ. P. 55.

B. The Appellate Court Did Not Abuse Its Discretion in Sanctioning Petitioner.

Petitioner contends that the Federal Circuit abused its discretion in ordering him to pay the costs and attorneys' fees on appeal of the six respondents. The

court properly ordered this, finding that "[i]n filing and maintaining this completely unfounded and vexatious appeal, Constant has subjected appellees to unnecessary expenditures and has wasted the resources of this court." (Pet. App. A-4).

Petitioner erroneously contends that the Federal Circuit could not impose these sanctions without first giving him an opportunity to respond. However, in 1982, the Federal Circuit explicitly adopted Fed. R. App. P. 38 and stated, "After the date of this opinion, a frivolous appeal filed or proceeded with in this court, will result in imposition of damages and costs upon appellant and counsel in accordance with Rule 38." *Asberry v. United States Postal Serv.*, 692 F.2d 1378, 1382 (Fed. Cir. 1982). Subsequent cases have interpreted this to mean that "neither notice to [the party] against whom the fees and costs were assessed nor a hearing [is] required" when the court awards fees and costs pursuant to Rule 38. *Sun-Tek Industries v. Kennedy Sky-Lites, Inc.*, 865 F.2d 1254, 1255 (Fed. Cir. 1989).

Petitioner also claims the court abused its Rule 38 powers, contending that such sanctions are justified only if Congressional policy and case law both are clearly contrary to his position, and that Congressional policy favors patent actions. However, the District Court did not dismiss petitioner's action merely because he sought to enforce a patent, but because he repeatedly refused to comply with the court's order. Moreover, Congressional policy clearly disfavors bringing frivolous appeals, as the Federal Circuit determined this appeal to be. *See Sun-Tek*, 865 F.2d at 1255.

Petitioner also claims that the attorneys' fees and costs imposed were unreasonable. The Federal Circuit has held that "[o]rdinarily the only inquiry in determining

the propriety of the amount of attorney fees to be paid as damages by an appellant who has filed a frivolous appeal is whether the appellee actually incurred the fees sought in defending against the appeal." *Sun-Tek*, 865 F.2d at 1255. In this case, appellees were required to file supporting documentation with their Application for Attorney Fees and Costs. The court reviewed these documents and awarded fees accordingly. (Pet. App. A-9 to A-10).

Finally, petitioner contends that the imposition of attorneys' fees violates his equal protection rights, since "fees are not available to petitioner who does not have enough money to hire attorneys." (Pet. Brief at 32). However, the critical inquiry in awarding attorney's fees is whether the fees claimed actually were incurred. *Sun-Tek, supra.* Since a non-attorney representing himself does not incur attorney's fees, the judicial interest here is fairness to the parties opposing the *pro se*, who incurred substantial attorneys' fees in defending against this frivolous appeal.

VIII. The Issues Presented Above Are Not Appropriate for Review on Writ of Certiorari.

This Court has stated, " '[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' " *Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Petitioner's claims affect only the parties involved, and are meritless. As such, this Court should " 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations.' " *Labor Bd. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951). (quoting *Fed. Trade Comm'n v. Am. Tobacco Co.*, 274 U.S. 543, 544 (1927)). *Accord*, Sup. Ct. Rule 17(c).

CONCLUSION

For the reasons set forth above, respondents submit that a writ of certiorari should not be granted in this case.

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Respectfully submitted,

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